Filing # 85695598 E-Filed 02/28/2019 05:42:33 PM

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC18-2024

LEROY POOLER

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Leroy Pooler, Defendant below, will be referred to as "Pooler" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate records will be as follows:

> "R" - for the direct appeal record in #SC60-87771;
>
> "PC" - for the postconviction appeal record in #SC05-2191; and
>
> "2PC" – for the instant appellate record.

Supplemental materials will be designated by the symbol "S" preceding the type of record referenced and the appropriate volume and page number(s) will be provided. Pooler's initial brief will be notated as "IB."

STATEMENT OF THE CASE AND FACTS

On February 23, 1995, Leroy Pooler ("Pooler") was indicted for the January 30, 1995 first-degree murder of Kim Brown, attempted first-degree murder of her brother, Alvonza Colson, and armed burglary of their apartment. Trial commenced on January 9, 1996 and the jury returned on January 17, 1996 with a guilty verdict for all counts. (R.19 1320-23). Following the penalty phase, the jury recommended death by a nine to three vote. The trial court imposed life sentences for the attempted first-degree murder and armed burglary convictions. Also,

Pooler was sentenced to death for Kim Brown's murder based on the finding of three aggravators: "(1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder of Alvonza); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or cruel." *Pooler v. State*, 704 So. 2d 1375, 1377 (Fla. 1997).

The facts, relevant to the criminal conviction and sentences, were found by the Florida Supreme Court on direct appeal as follows:

> Leroy Pooler was convicted of first-degree murder for the shooting death of his ex-girlfriend, Kim Wright Brown. He also was convicted of burglary and attempted first-degree murder with a firearm. The facts supporting these convictions are as follows. On January 28, 1995, Carolyn Glass, a long-time acquaintance of Kim Brown, told her that Pooler had said he was going to kill her because if he could not have her, no one else would. (Evidence showed that Kim Brown had begun seeing another man.) Two days later, Pooler knocked on the front door of the apartment where Kim and her younger brother, Alvonza Colson, lived with their mother. Seeing Pooler through the door window, Kim told him that she did not want to see him anymore. Alvonza opened the door halfway and asked Pooler what he wanted but would not let him in. When Pooler brandished a gun, Alvonza let go of the door and tried to run out the door, but he was shot in the back by Pooler. Pooler pulled Alvonza back into the apartment by his leg. Kim begged Pooler not to kill her brother or her and began vomiting into her hands. She suggested they take Alvonza to the hospital. Pooler

originally agreed but then told Alvonza to stay and call himself an ambulance while Pooler left with Kim. However, rather than follow Pooler out the door, Kim shut and locked it behind him. Alvonza told Kim to run out the back door for her life while he stayed in the apartment to call for an ambulance. When he discovered that the telephone wires had been cut, he started for the back door, just as Pooler was breaking in through the front entrance.

Pooler first found Alvonza, who was hiding in an area near the back door, but when he heard Kim yelling for help, he left Alvonza and continued after Kim. When he eventually caught up with her, he struck her in the head with his gun, causing it to discharge. In front of numerous witnesses, he pulled her toward his car as she screamed and begged him not to kill her. When she fought against going in the car, Pooler pulled her back toward the apartment building and shot her several times, pausing once to say, "You want some more?" Kim had been shot a total of five times, including once in the head. Pooler then got into his car and drove away.

The jury recommended death by a vote of nine to three. The trial court found the following aggravators: (1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder of Alvonza); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or cruel. The trial court found as statutory mitigation that the crime was committed while Pooler was under the influence of extreme mental or emotional disturbance, but gave that finding little weight. The court found the following proposed statutory mitigators had not been established: (1) the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (2)

> the defendant acted under extreme duress or under the substantial domination of another person; and (3) the defendant's age (he was 47).
>
> As nonstatutory mitigation, the trial court found the defendant's honorable service in the military and good employment record, as well as the fact that he was a good parent, had done specific good deeds, possessed certain good characteristics, and could be sentenced to life without parole or consecutive life sentences. The only mitigator given considerable weight was Pooler's honorable military service; the others were given some to little weight. The trial court expressly rejected as unestablished nonstatutory mitigation that Pooler has a good jail record and an ability to adapt to prison life; that he has low normal intelligence; that he has mental health problems; that he is rehabilitable; that the homicide was the result of a heated domestic dispute; and that he is unlikely to endanger others and will adapt well to prison. Concluding that each of the three aggravators standing alone would outweigh the mitigating evidence, the court sentenced Pooler to death.

Pooler, 704 So. 2d at 1377. The convictions and sentences were affirmed on direct appeal. *Id.* and the United States Supreme Court, on October 5, 1998, denied Pooler's petition for writ of certiorari. Pooler v. Florida, 525 U.S. 848 (1998).

On September 17, 1999, Pooler filed a shell motion for postconviction relief. (PC.1 1-22, 53-59). By agreement of the parties, Pooler was given additional time to file an amended motion. (PC.1 65-68) Such amended motion was filed, on March 13, 2000, and the State responded. (PC.1 72-237). An evidentiary

hearing was granted on three claims addressed to ineffective assistance of counsel at the guilt and penalty phases as well as an *Ake v. Oklahoma*, 470 U.S. 68 (1985). (PC.4 670; PC.17 48).

Subsequently, on September 17, 2002, Pooler sought a stay of the proceedings based on *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Ring v. Arizona*, 536 U.S.584 (2002), to which the State objected, however, leave was granted for Pooler to file amended claims. (PC.4 657-58, 659-69, 670; Memo filed October 22, 2002). On November 8, 2002, Pooler filed a supplemental claim asserting his conviction and death sentence were obtained in violation of *Ring*. (PC.4 671-76). However, **he did not raise an *Atkins* claim**, even though his attained IQ scores were discussed at various times during the pre-trial, trial, and postconviction litigation.[1]

---

[1] The record reveals that during Pooler's pre-trial competency hearing, Dr. Alexander opined that Pooler had an estimated IQ between 75 and 85, and that "Pooler was not suffering from any undue stress, mental illness, or personality disorder." *Pooler*, 980 So.2d at 468. Dr. Levine reported concern over Pooler's ability to assist with his defense, but found ultimately that Pooler was competent and had an IQ of 80. *Id*. Trial defense counsel, Michael Salnick, for Pooler's penalty phase presentation called two doctors who had evaluated Pooler while he was incarcerated. Dr. Armstrong found Pooler to be depressed, complaining of hearing voices, and without a reason to live. The doctor diagnosed Pooler with a "judgment disorder with emotional features." *Id*. Dr. Desormeau noted Pooler had complained of hearing voices, but it was the doctor's opinion that Pooler was depressed as a result of the murder charges he faced. *Id*.

When testifying at the postconviction evidentiary hearing, Dr. Brannon, Pooler's mental health expert, found that Pooler could appreciate the criminality of his conduct at the time of

On November 19, 2003, while his First Amended Postconviction Relief motion and his Supplemental Motion to Vacate his conviction and sentence were pending, Pooler moved to have the trial court determine competency. Toward this end, Drs. John Spencer and Michael Brannon were appointed to evaluate Pooler and report to the trial judge. Following the submission of the experts' reports, on November 12, 2004, a competency hearing was held where the parties agreed the trial court could rely on the experts' reports. On November 29, 2004, the trial court found Pooler competent. (PC.5 866-67)

On May 16, 2005, an evidentiary hearing was held on Pooler's postconviction motion.[2] (PC.4 745-61; PC.18 150-372) Based upon the trial court's reading of the trial transcript and considering the evidentiary hearing testimony and evidence, all pending claims were resolved on November 4, 2005, with the entry of a written order denying relief. (PC.11 1961-2006; PC.12 2010-55). Pooler appealed (PC.12 2007-08) and on January 31, 2008,

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the crime. The doctor refused to find a Post-Traumatic Stress Disorder. (PC.18 350-51). As mitigation, he offered: (1) neurological damage/functioning based upon alleged head trauma/injuries as supported by Dr. Levine's evaluation/report; (2) confabulation; (3) borderline IQ; and (4) alcohol abuse. (PC.18 335-45, 350-51).

[2] At the evidentiary hearing, Pooler's postconviction claims were combined into two issues: (1) ineffective assistance of guilt phase counsel for failing to investigate and present an intoxication defense (2) ineffective assistance of penalty phase counsel for failing to investigate and present mitigating factors and for failing to obtain and prepare mental health professionals.

this Court affirmed the denial of postconviction relief. *Pooler v. State*, 980 So.2d 460, 468 (Fla.), *cert. denied*, 555 U.S. 911 (2008).

Having been denied relief by the state courts, on May 19, 2008, Pooler, filed a petition for a writ of habeas corpus and new counsel was appointed by the federal court. The federal district court denied relief and the circuit court of appeals affirmed. *Pooler v. Sec'y, Florida Dept. of Corr.*, 702 F.3d 1252 (11th Cir. 2012), *cert. denied*, 134 S.Ct. 191 (2013).

In its opinion, the Circuit Court of Appeals discussed Pooler's mental health presentation as follows:

> Neuropsychologist Dr. Levine first testified that he was appointed by the state trial court to evaluate Pooler's competency. Dr. Levine described the evaluation, which included assessments of Pooler's intelligence and cognitive functioning. Pooler's cognitive functioning was "in the low average to mildly impaired range." Pooler's performance IQ results ranged from about 75 to 85. Low average is 80 to 89, and borderline retarded is 70 to 79.
>
> On the WAIS–R intelligence test, Pooler's scores were 81 for verbal IQ, a 79 for performance IQ, and a full-scale IQ of 80. Pooler's scores put him "right on the cusp of the low average to the borderline range." Pooler scored in the borderline range on four of nine WAIS–R subtests. Pooler's reading ability, which was at the third-grade level, "was dramatically impaired."
>
> Pooler shared with Dr. Levine portions of his educational, military, and job history. Pooler told him that Pooler graduated from

high school, served in the military and achieved the rank of sergeant, and held down a job for an extended period of time. To Dr. Levine, this suggested Pooler's intelligence should be in the average range, not low average to borderline, but Dr. Levine found that all of Pooler's test results were internally consistent, and there was no evidence of malingering.

Dr. Levine also talked about Pooler's mental health. Dr. Levine learned from the jail's medical records that Pooler, after his arrest, "had a significant emotional reaction to whatever it was that was going on." Pooler "had pretty much resolved his mental health issues" by the time Dr. Levine examined him. Dr. Levine noted, though, that Pooler appeared to be "experiencing some depressive symptoms." Dr. Levine's "clinical impression" was that Pooler had some symptoms of depression but "did not meet the criteria for a [depression] diagnosis."

In mitigation, the defense next called psychologist Steve Alexander. Dr. Alexander, also appointed by the court, had evaluated Pooler's competency, too. Dr. Alexander concluded that Pooler was not competent to stand trial.

Dr. Alexander admitted that Pooler's ability to appreciate the criminality of his conduct, or to conform his conduct to the law's requirements, was not impaired. Dr. Alexander saw no signs of "any long-term mental illness, or personality disorder or disturbance that would have been existing at the time of the shooting."

However, Dr. Alexander believed Pooler was not competent because he did not fully understand the current legal proceedings. Other inmates were telling Pooler incorrect information and Pooler "was grossly misinformed for what appropriate court procedure was and what role he would take in

trial." Thus, Pooler "would totally misunderstand the proceedings as they were unfolding, and due to misunderstandings and misperceptions maybe even be disruptive." Although Dr. Alexander found it "clear in talking to [Pooler that] he's a man of relatively limited intelligence," he did not need to administer an IQ test because Pooler was "not so mentally deficient or retarded that that was the basis of an incompetency." Dr. Alexander estimated Pooler's IQ was between 75 and 85, which was "in the lower low average range ... or the upper end of a borderline."

According to Dr. Alexander, Pooler was gullible and displayed "some gross misperceptions about the legal system and the way it worked." Pooler's incompetence to stand trial was not caused by a mental illness, defect, or disease, "but instead was just a real lack of understanding [and] basically distrust, given his situation, ... being fearful, not knowing who to believe, and then erroneously, given his ... limitations, erroneously placing value and importance on the opinions of other inmates rather than on his attorney."

In mitigation, the defense also called psychiatrist Jude Desormeau, who testified about Pooler's depression, his being on suicide watch in the jail, and being in the jail's mental health unit receiving treatment. Dr. Desormeau examined Pooler in February 1995 after he was referred by the psychiatric nurse at the jail. Pooler was depressed and anxious and had spoken of harming himself, so he was placed on suicide watch.

Dr. Desormeau concluded Pooler was suffering from "an adjustment disorder with mixed features," making Pooler "very depressed and very anxious and tearful." Dr. Desormeau prescribed a tranquilizer. After seven to ten days, Pooler stabilized and was sent to

> a different doctor. Pooler was then taken off the tranquilizer.
>
> Psychiatrist Dr. Michael Armstrong, a staff psychiatrist at the jail, also testified about Pooler's depression and adjustment disorder. Dr. Armstrong saw Pooler before he was discharged from the jail's mental health unit into the general population. Pooler was in Dr. Armstrong's mental health transitional unit for about two weeks. At first, Pooler reported both that he was depressed and that he heard a voice calling his name, which began when he came to the jail. By the end of his stay, Pooler "was functioning very well and was ready for the general population."

Pooler, 702 F.3d at 1258–60 (footnote omitted).

The federal appellate court also summarized the postconviction testimony of Pooler's mental health expert, Dr. Brannon finding:

> Psychologist Dr. Michael Brannon, Pooler's final 3.850 witness, evaluated Pooler and administered an intelligence test. Pooler received an IQ score of 75, which put him in the borderline range. Dr. Brannon found that Pooler was competent to proceed. Dr. Brannon believed that, in his self-reporting of his background, Pooler was confabulating—that is, not outright lying but filling in the gaps in one's memory with inaccurate information.
>
> Dr. Brannon believed Pooler "had a severe alcohol problem," a "high probability of severe substance dependency," and alcohol dependency disorders. Dr. Brannon summarized his areas of concern: (1) Pooler's IQ, which fell in the borderline range based on current and past testing; (2) Pooler's neuro-psychological deficits, as shown in Dr. Levine's report; (3) Pooler's alcohol

> dependence and abuse; and (4) the possibility, which more investigation would be needed to confirm, that Pooler had post-traumatic stress disorder ("PTSD") from Vietnam. Pooler "certainly shows extreme traumatic stress-like reactions," but Dr. Brannon did not know whether they rose to the level of PTSD.

Pooler, 702 F.3d at 1265.

On May 26, 2015, a year after *Hall* was decided, Pooler's federally appointed counsel filed for relief under *Atkins* and *Hall* claiming Pooler is Intellectually Disabled ("ID"). (2PC.1 26-53). The State responded. (2PC.1 61-85). On November 30, 2015, the trial court permitted Pooler's state postconviction counsel, Bradley Collins to withdraw. (2PC.1 116-17). Eventually, Pooler's present counsel was appointed *nunc pro tunc* back to November 28, 2015. (2PC.1 129-32; 231-32).

On January 4, 2017, Pooler filed an overlarge amended successive postconviction relief motion raising a *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) claim. (2PC.1 339-78). The amendment was denied; however, Pooler was permitted to file another amended motion within the page limits. (2PC.1 150-51, 178-201). The State responded. (2PC.1 202-27). Following the Case Management Conference (2PC 285-335), on October 12, 2018, the trial court entered an order denying relief summarily (2PC 239-51). This appeal followed. (2PC 253-54).

SUMMARY OF THE ARGUMENT

Issue I – The trial court denied Pooler's *Atkins* claim properly as time barred. Although Pooler was aware of *Atkins*, having sought leave to add such a claim to his postconviction motion, when given the opportunity to file an *Atkins* claim, he declined to do so. At the time of the promulgation of Rule 3.203 Fla. R. Crim. P. on May 20, 2004, Pooler's postconviction motion remained pending in the trial court, but again, he did not move to add an *Atkins* claim. Pursuant to *Blanco v. State*, 249 So. 3d 536, 537 (Fla. 2018), a defendant who failed to raise a timely *Atkins* claim and only raised the claim for the first time in light of *Hall* is time-barred.

Issue II – Pooler's case became final on October 6, 1998 well before *Ring v. Arizona* issued. As a result, *Hurst v. Florida* and *Hurst v. State* are not retroactive to Pooler's case and the summary denial of his claim was proper. *See Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); *Asay v. State*, 210 So. 3d 1 (Fla. 2016). Moreover, Pooler has contemporary felony convictions for attempted first-degree murder and armed burglary which rendered him eligible for capital sentencing, thus, his capital sentence does not run afoul of the Sixth Amendment as discussed in *Hurst v. Florida*.

Issue III – This Court has rejected the suggestion that the pre-*Hurst* death penalty jury instruction undermined the jury's

sense of responsibility as discussed in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). It also has rejected the claim that a non-unanimous death sentence violates the Sixth, Eighth, and Fourteenth Amendments in light of *Caldwell*. *See Reynolds v. State*, 251 So. 3d 811, 818–28 (Fla. 2018), *cert. denied sub nom*. *Reynolds v. Florida*, 139 S. Ct. 27 (2018). Hence, the summary denial of relief was proper and should be affirmed.

ARGUMENT

ISSUE I

POOLER'S SUCCESSIVE POSTCONVICTION RELIEF MOTION RAISING AN *ATKINS* CLAIM FOR THE FIRST TIME FOLLOWING *HALL* WAS TIME-BARRED AND DENIED PROPERLY (restated)

Pooler, although granted leave to amend his original postconviction motion in 2002 to add an *Atkins* claim, declined to do so. Even after the passage of Rule 3.203 in 2004, Pooler did not raise an ID claim even though he continued to litigate his postconviction claims in the trial court. In 2005, he completed the Circuit Court litigation of his postconviction relief motion on which he was granted an evidentiary hearing on various claims. In 2008, this Court affirmed the denial of relief. *Pooler*, 980 So.2d at 460. It was not until a year after *Hall* was decided that Pooler raised for the first time an ID claim. Due to Blanco's abandonment of the claim in 2002 and failure to file an ID claim when given a second opportunity once Rule 3.203 was promulgated, the instant claim is time-barred. Pooler had until November 30, 2004 to raise an ID claim; and having failed to do so timely, he is barred from raising such a claim now and from obtaining relief. *See Blanco v. State*, 249 So. 3d 536, 537 (Fla. 2018)

A. Standard of Review - In *Hunter v. State*, 29 So.3d 256 (Fla. 2008) this Court recognized: "Rule 3.851(f)(5)(B) permits

the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." "Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009).

B. Trial Court's Order – The trial court recognized this Court's decision in *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) as well as the time bar this Court found in the similarly situated cases of *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016) (mem.); *Blanco*, 249 So. 3d at 537, given *Amendments to Florida Rule of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 2d 563, 570 (Fla. 2004) (promulgating the new Rule 3.203). Recognizing that trial courts are bound to follow Florida Supreme Court precedent, and that Pooler failed to file a timely ID motion in 2004, the trial court found the instant motion time-barred and denied relief. Although it made those findings and ruling, the trial court voiced its disagreement with the application of a time-bar when imposed against ID claims. (2PC 239-51)

C. Allegations of Intellectual Disability – During the pre-trial competency hearing, Pooler's mental health

professional, Dr. Alexander opined that Pooler had an estimated IQ between 75 and 85, and that "Pooler was not suffering from any undue stress, mental illness, or personality disorder." *Pooler*, 980 So.2d at 468. Dr. Levine reported concern over Pooler's ability to assist with his defense, but found ultimately that Pooler was competent and had an IQ of 80. *Id*. Trial defense counsel, Michael Salnick, for Pooler's penalty phase presentation called two doctors who had evaluated Pooler while he was incarcerated. Dr. Armstrong found Pooler to be depressed, complaining of hearing voices, and without a reason to live. The doctor diagnosed Pooler with a "judgment disorder with emotional features." *Id*. Dr. Desormeau noted Pooler had complained of hearing voices, but it was the doctor's opinion Pooler was depressed as a result of the charges he faced. *Id*.

When testifying at the 2005 postconviction evidentiary hearing, Dr. Brannon, Pooler's mental health expert, found that Pooler could appreciate the criminality of his conduct at the time of the crime and refused to find a Post-Traumatic Stress Disorder. (PC.18 350-51). As mitigation, he offered: (1) neurological damage/functioning based upon alleged head trauma/injuries as supported by Dr. Levine's evaluation/report; (2) confabulation; (3) borderline IQ; and (4) alcohol abuse. (PC.18 335-45, 350-51).

D. Analysis – It is Pooler's claim that he cannot be time-

barred from raising a claim based on *Hall* given his IQ scores between 75 and 80, but must be provided "a fair opportunity to show that the Constitution prohibits" his execution. It was not until 2015, a year after *Hall* was decided, that Pooler presented an ID claim in a successive postconviction motion. Previously, in 2002, he waived an *Atkins* claim after being granted leave to amend his postconviction relief motion and then he chose not to pursue an ID claim after this Court promulgated Rule 3.203 in October 2004.

In *Rodriguez*, this Court affirmed the imposition of a time-bar where a defendant failed to file an ID claim within the time limits following *Atkins* and Rule 3.203. This Court provided:

> This cause is before this Court on Rodriguez's appeal of the summary denial of his "Motion for Determination of Intellectual Disability and Successive Motion to Vacate Death Sentences with Special Request for Leave to Amend" pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203. Rodriguez's motion was filed on May 22, 2015. Rodriguez, who had never before raised an intellectual disability claim, asserted that there was "good cause" pursuant to Rule 3.203(f) for his failure to assert a previous claim of intellectual disability and only after the United States Supreme Court decided *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), did he have the basis for asserting an intellectual disability claim. The trial court rejected the motion as time barred, concluding there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct.

> 2242, 153 L.Ed.2d 335 (2002). The trial court further concluded that Rodriguez could not have relied on *Cherry v. State*, 959 So.2d 702 (Fla. 2007), which established the bright-line cut-off of 70 for IQ scores disapproved of in *Hall*, because he never raised an intellectual disability claim after *Atkins* as required by Rule 3.203.
>
> We have considered the issues raised, and affirm the trial court's denial of Rodriguez's motion as time-barred for the reasons stated by the trial court.

Rodriguez, 250 So. 3d at 616. *See also, Blanco*, 249 So. 3d at 537 (concluding "intellectual disability claim is foreclosed by the reasoning of this Court's decision in *Rodriguez*"). Pooler asks this Court to revisit *Rodriguez* and *Blanco* and their application of a time-bar where the defendant failed to comply with the time limitations announced in Rule 3.203.

The United States Supreme Court has recognized that a constitutional claim may become time-barred just as any other claim may be time-barred). *Cf. Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983). Pooler points to *Trop v. Dulles*, 356 U.S. 86 (1958) and *Dear Wing Jung v. United States*, 312 F.2d 73, 75-76 (9th Cir. 1962) to suggest that time-bars are not appropriate in Eighth Amendment jurisprudence. However, those cases did not raise procedural or time bars. Instead, each dealt with evolving standards of decency under the Eighth Amendment as it relates to striping a person of his citizenship. Time-bars were not discussed.

Pooler suggests that the ID claim was not available to him in 2004 given the wording of the statute, §921.137, Fla. Stat. (2001) (requiring the IQ be two standard deviation below the norm). However, even Hall recognized that the wording of the statute was not a bar to raise the claim as it was not until 2007 with this Court's issuance of Cherry that the bright-line value was established. *See Hall*, 572 U.S. at 711-12, 720. (noting "when *Atkins* was decided the Florida Supreme Court had not yet interpreted the law to require a strict IQ cutoff at 70. That new interpretation runs counter to the clinical definition cited throughout *Atkins* and to Florida's own legislative report indicating this kind of cutoff need not be used"). This Court has also found that the statute and Rule 3.203 did not foreclose the Atkins claim to those who had IQ scores above 70, but within the margin of error. *See Rodriguez*, 250 So. 3d at 616.

The United States Supreme Court has not held that *Hall* is retroactive to cases on collateral review. While this Court gave retroactive application to Hall under state law, it did so only where the defendant had raised a timely *Atkins* claim. *See Walls v. State*, 213 So.3d 340, 348 (Fla. 2016), *reh'g denied*, SC15-1449, 2017 WL 74847 (Fla. Jan. 9, 2017), and *cert. denied sub nom. Florida v. Walls*, 138 S. Ct. 165 (2017). Further, as noted above, the United States Supreme Court in Hall recognized that Florida's definition of ID was constitutional on its face,

but noted its concern stemmed from this Court's interpretation of the IQ prong as announced in *Cherry*, 959 So.2d at 702. See *Hall*, 572 U.S. at 711-12. Moreover, *Hall* did not change Florida's definition of ID, but merely held it was unconstitutional for Florida to refuse to grant an evidentiary hearing to those defendants whose IQ fell between 70 and 75. Hall, 572 U.S. at 723-24 (providing "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.") Thus, this was not a substantive change as it did not categorically expand the class of defendants excluded from execution to all those with IQ's between 70 and 75. It merely allowed for further inquiry and did not demand *Hall* be retroactive beyond those cases where the claim had been raised timely and rejected under the unconstitutional definition announced in *Cherry*. *See In re Henry*, 757 F.3d 1151, 1159-61 (11th Cir. 2014) (finding "the rule pronounced by the Supreme Court in *Hall* was not made retroactive to cases on collateral review"). Pooler has offered nothing to alter this Court's decision in *Rodriguez* and *Blanco* applying a time bar.

Similarly, *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) and Pooler's suggestion that the Supremacy Clause demands

retroactivity of Hall is unsupported. In *Montgomery* the United States Supreme Court held that the state court was in error when it refused to find *Miller v. Alabama*, 567 U.S. 460 (2012)(barring mandatory life without parole sentences for juveniles) did not apply retroactively. *Montgomery*, 136 S.Ct. at 727. The Supreme Court determined that *Miller* had "announced a substantive rule of constitutional law," not a procedural one because it placed a specific punishment beyond the State's power to impose. *Id*. at 734. That is not the case with *Hall*. *See Henry*, 757 F.3d at 1159-60; *Blanco*; *Rodriguez*. *See also, Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (finding *Atkins* claim barred under Rule 3.203 and 3.851 as defendant failed to raise his claim by November 30, 2004); *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (finding defendant's habeas corpus application, including his *Atkins* claim, time-barred because he filed it 29 months after the deadline).

To the extent that Pooler relies on *Walls* to maintain *Hall* is retroactive, this Court will recall *Walls* was decided after *Rodrigues*, but before *Blanco*. As such, *Walls* did not find *Hall* to be fully retroactive so as to excuse a defendant's failure to file an ID claim under the time limits of Rule 3.203. *Walls* was made retroactive to those defendants who had raised timely ID claims by the rule-imposed deadline and were denied relief either summarily of after an evidentiary hearing based on an

uninformed definition of IQ and the application of the inherent standard error of measurement. Unlike the defendant in *Walls*, Pooler abandoned his opportunity to file an ID claim in 2002-2004, but instead waited some dozen years to bring the issue forward.[3] This Court should find that ID claims which were not raised timely under Rule 3.203 are time barred. *See Blanco; Hill; Rodriguez.* The denial of relief should be affirmed.

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[3] Pooler asserts that denying him the opportunity to litigate an ID claim runs the risk that his capital sentence will be inflicted in an arbitrary and capricious manner. Besides the fact that in 2002 Pooler knew he had the opportunity to raise the claim and chose not to, the three cases to which he points do not further his position. In *Johnston v. State*, case no. SC10-356, while this Court allowed consideration of a "newly discovered" ID claim, this Court never issued a decision as *Johnston* died before the litigation was concluded. As a result, *Johnston* should not be considered here. With respect to *Coleman v. State*, 64 So.3d 1210 (Fla. 2011), relinquishment was permitted shortly after there had been a change in counsel on appeal where prior counsel had waived an issue before Rule 3.203 went into effect and new counsel, after having received the defendant's records moved to relinquish jurisdiction just a few months after promulgation of Rule 3.203. It is not clear what equities and case-specific facts entered into this Court's decision, however, it does not undercut *In re: Hill; Rodriguez*; and *Blanco*. *Phillips v. State*, 249 So.3d 596 (Fla. 2018) does not further Poolers position. There, the case was remanded for a new penalty phase, thus, no sentence existed and the defendant was able to raise ID as part of his new sentencing. That is not the situation here. Pooler's sentence is final and he is time-barred from challenging it here under *In re: Hill; Rodriguez*; and *Blanco.* Further, *Bevel v. State*, 221 So.3d 1168 (Fla. 2017) does not assist Pooler. There, relief was granted upon this Court's finding counsel was ineffective in his investigation and presentation of the penalty phase. This Court applied the standards announced in *Strickland v. Washington*, 466 U.S. 668 (1984) and made the legal determination that deficiency and prejudice resulted. A time-bar for failure to raise a claim was not the issue.

ISSUE II

POOLER'S CAPITAL SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT FOLLOWING *HURST V. STATE* (restated)

Pooler asserts that *Hurst v. State*, 202 So.3d 40 (Fla. 2016) created a new crime of capital murder requiring that *Hurst* be applied retroactively to all capital defendants under the Eighth Amendment and Due Process. He claims that this Court's reliance upon *Witt v. State*, 387 So.2d 922 (Fla. 1980) conflicts with *Bunkley v. Florida*, 538 U.S. 835 (2003) which addressed the treatment of those defendants following a state court's redefining of a necessary element of a crime. Pooler also takes issue with the fact that some capital defendants who had committed their murders before Pooler committed his, but, received *Hurst* relief whereas Pooler did not. He also claims that his jury was not instructed that it has to find the aggravation beyond a reasonable doubt.[4] Finally, he maintains that his jury was not instructed that the aggravators and "every element" must be proven beyond a reasonable doubt. This Court has rejected the Eighth Amendment and Due Process challenges repeatedly and has reaffirmed that Hurst does not apply

[4] Pooler's jury was instructed that the aggravation had to be found beyond a reasonable doubt. The jury was told "{each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." (ROA.21 1624). The balance of the instructions followed the standard instruction at the time of sentencing. (ROA.21 1620-27)

retroactively to cases final before June 24, 2002. Hurst relief was denied properly and this Court should affirm.

A. Standard of Review - In *Hunter v. State*, 29 So.3d 256 (Fla. 2008) this Court recognized: "Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." "Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009).

B. Trial Court's Order – The trial court followed this Court's decisions in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2016), *Asay v. State*, 210 So.3d 1 (Fla. 2016), and their progeny to rule that Pooler's case was final before *Ring v. Arizona*, 536 U.S> 304 (2002), thus, he was not entitled to relief under Hurst v. Florida, 16 S.Ct. 616 (2016) and Hurst v. State.

C. Analysis - This Court has held that *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) are not retroactive to cases final before June 24, 2004, the day *Ring v. Arizona*, 536 U.S. 584 (2002) was issued. *See Asay v. State,* 210 So. 3d 1, 22 (Fla. 2016), *cert. denied,* 138 S. Ct. 41 (2017). The judgment at issue in *Asay*, 210 So.3d at 1

became final October 7, 1991, and thus, Asay was not eligible for relief under *Hurst v. Florida* or *Hurst*. *Asay*, 210 So.3d at 8. *See also, Asay v. State, 224 So.3d at 703 (Fla. 2017)* (reiterating *Hurst* and *Hurst v. Florida* were not retroactive case final before *Ring* issued); *Mosley v. State*, 209 So.3d 1248, 1272-73 (Fla. 2016) (holding, as a matter of state law, *Hurst v. State* applies retroactively to defendants whose sentences were not yet final when *Ring* was decided); *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, 138 S.Ct. 513 (2017)(stating "[w]e have consistently applied our decision in *Asay V*, [210 So.3d at 22], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)."); *Lambrix v. State*, 227 So.3d 112 (Fla.), *cert. denied*, 138 S.Ct. 312 (2017)

In *Asay*, 210 So.3d at 15-16, this Court discussed the appropriate test for applying retroactivity to *Hurst* and applied the *Witt v. State*, 387 So.2d 922 (Fla. 1980) analysis for retroactivity under state law, "which provides ***more expansive retroactivity standards*** than those adopted in *Teague [v. Lane]*, 489 U.S. 288 (1989)," which enumerates the federal retroactivity standards. *Id*. (emphasis in original), *quoting Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005). *See also Danforth v. Minnesota*,

522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader that *Teague*). As recognized in *Hitchcock*, after *Asay*, 210 So.3d at 1, this Court has adhered staunchly to using the *Ring* decision date as the bright-line cutoff point for retroactivity of a *Hurst* claim. Thus far, this Court has refused to extend *Hurst v. Florida* and *Hurst* to 23 defendants, including Asay, based solely on the fact that their judgments were final prior to the decision in *Ring.*

On August 10, 2017, this Court reaffirmed the decision in *Asay* stating:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*. Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*.

Hitchcock, 226 So.3d at 216; *see also Asay v. State*, 224 So.3d 695, 703 (Fla. 2017) (rejecting claim that chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); *Lambrix v. State*, 227 So.3d at 112 (rejecting arguments based on the Eighth Amendment, denial of due process and equal protection, and a substantive right based on new legislation).

Here, just as was presented in *Hitchcock*, Pooler raises

various constitutional provisions to argue that *Hurst* should be applied retroactively to him. He claims that denying him retroactive application of *Hurst* violates the Eighth Amendment and denies him Due Process and he alleges that the factors to be considered by the jury in recommending a sentence are elements of a new crime of capital murder. This Court has rejected such a suggestion.

For support, Pooler points to *Fiore v. White*, 532 U.S. 225 (2001) and *Bunkley v. Florida*, 538 U.S. 835 (2003). Neither assist Pooler here. First, in *Foster v. State*, SC18-860, 2018 WL 6379348, at *4 (Fla. Dec. 6, 2018), this Court explained:

> These statutes and the rule of procedure illustrate that the *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) before the court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred. Thus, Foster's jury did find all of the elements necessary to convict him of the capital felony of first-degree murder—during the guilt phase.

Moreover, in *Fiore*, Fiore and his co-defendant, Scarpone, were convicted of operating a hazardous waste facility without a permit. The State of Pennsylvania argued that while Fiore and Scarpone had a permit, they deviated so dramatically from its terms that they violated the statute. The Pennsylvania Supreme Court declined to review Fiore’s conviction, but later reversed

Scarpone's conviction finding that although it was unlawful to operate without a permit, one who merely deviates from a permit's terms did not qualify as a person without a permit. *Fiore*, 531 U.S at 227.

The appellate court reviewing Fiore's federal habeas petition believed the Pennsylvania court had announced a new rule in Scarpone's case, inapplicable to Fiore, and pointed out that state courts are under no constitutional obligation to apply new rules retroactively. *Id*. However, upon review, the United States Supreme Court requested the Pennsylvania court explain whether Scarpone's case created a new law. The Pennsylvania court replied that *Scarpone* did not announce a new law, but clarified the law at the date Fiore's conviction became final. Based on that explanation, the Supreme Court ruled that because Scarpone's case did not create a new law, it did not present an issue of retroactivity; instead, the question was whether Fiore could be convicted for conduct Pennsylvania's statute did not prohibit. The Court ruled Fiore's conviction was a violation of due process because failure to possess a permit is a basic element of the crime and Pennsylvania could not prove this element as Fiore had a permit. *Id*. at 228-229.

Fiore is inapplicable here as that defendant was convicted of a crime for which the state could not prove an essential element. Conversely, Pooler was found guilty of first degree

murder by a unanimous jury; the State proved all required elements. *Hurst* merely established a procedural change in sentencing. Procedural changes are applicable only to pending prosecutions. This Court recognized the procedural nature of the change in *Jackson v. State*, 213 So. 3d 754 (Fla. 2017) where it discussed Chapter 2016-13, the predecessor of Chapter 2017-1, and its increase in the number of jurors necessary to recommend death, and finding the change was procedural not substantive. See also *Foster v. State, supra.*

This Court has rejected the *Hurst*-related claims of: (1) due process violation; (2) Eighth Amendment violation; and that (3) Hurst v. State and the related amended statute created a substantive change in the law requiring retroactive application. *See Hannon v. State*, 228 So. 3d 505, 512 (Fla. 2017), *cert. denied sub nom. Hannon v. Florida*, 138 S. Ct. 441 (2017).

Even if *Hurst* were applied to Pooler's case, any error is harmless beyond a reasonable doubt as Pooler's jury recommended convicted him of contemporaneous attempted murder and armed burglary of victim's home resulting in the prior violent felony aggravator and during the course of a felony aggravator. As a result, at the of conviction Pooler was death eligible; the jury found both aggravators in this case unanimously by its verdict. While this Court has not re-embraced *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) fully, *see King v. State*, 211 So.3d

866, 891 (Fla. 2017), the United States Supreme Court recognized the critical distinction of an enhanced sentence supported by a prior conviction in *Almendarez-Torres*; *Ring*, 536 U.S. at 598 n.4; *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013). *Hurst v. Florida* did not disturb this precedent.

Also, while this Court declined to model its harmless error analysis after *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017) for a post-*Ring* case, *Pagan v. State*, 2018 WL 654450 (Fla. Feb. 1, 2018), the United States Supreme Court has confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, the Supreme Court reversed and reinstated the death sentence. *See Waldrop v. Comm'r, Alabama Dep't of Corr.*, 711 Fed.Appx. 900 (11th Cir. Sept. 26, 2017) (explaining its rejection of a *Hurst* claim, Circuit Court of Appeals stated: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. See §13A-5-45(e).").

ISSUE III

CALDWELL V. MISSISSIPPI DOES NOT CALL INTO QUESTION THE CONSTITUTIONALITY OF POOLER'S DEATH SENTENCE (restated)

Pooler complains that his jury was told repeatedly that its sentencing recommendation was advisory only, and as a result, his sentence is unconstitutional under the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Contrary to Pooler's position, this Court has rejected this claim.

In *Caldwell* the United States Supreme Court found that a prosecutor's comments diminishing the jury's sense of responsibility for determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). In the instant case, there was no *Caldwell* error. To establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).[5]

[5] In *Caldwell*, error was found based on the prosecutor's argument to the jury that the appellate court would review that sentence and would decide whether the death sentence was appropriate. "To establish a *Caldwell* violation, a defendant necessarily must

Poolers reliance on Caldwell is misplaced. First, *Caldwell* does not render capital sentences infirm. *Reynolds v. State*, 251 So. 3d 811, 818-28 (Fla.), *cert. denied sub nom. Reynolds v. Florida*, 139 S. Ct. 27 (2018). Second, any complaint about jury instructions is untimely/procedurally barred. *Troy v. State*, 57 So. 3d 828, 838 (Fla. 2011). Third, Pooler cannot show constitutional error as the instructions did not "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). The jury was instructed properly based upon then existing law. (ROA.21 1620-27). *See Reynolds*. It is absurd to suggest the jury should have been instructed in accordance with a change in the law occurring 20 years later. Forth, the claim is speculative at best; there is nothing indicating the jury's responsibility was diminished. For these reasons, the denial of relief should be affirmed.

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show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (rejecting a *Caldwell* attack, explaining "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision")

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the summary denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Linda McDermott, Esq., at lindammcdermott@msn.com, this 28th day of February 2019.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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